Penang Port Commission v Kanawagi s/o Seperumaniam

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–14 OF 1998(W)
STEVE SHIM CJ (SABAH AND SARAWAK), SITI NORMA YAAKOB AND MOHTAR ABDULLAH FCJJ
21 NOVEMBER 2002

Civil Procedure *— Judicial precedent — Court of Appeal — Whether one Court of Appeal could set aside the previous orders of another Court of Appeal — Courts of Judicature Act 1964 ss 43 and 44*

On 14 October 1998, the Federal Court granted the appellant leave to appeal against the decision of the Court of Appeal given on 6 September 1996. The memorandum of appeal raised the following issues: (1) that the Court of Appeal had misdirected itself in law in allowing the respondent's application to set aside the previous orders of the Court of Appeal granted on 3 January 1995 and 2 August 1995 respectively; and (2) the Court of Appeal had misdirected itself on the construction of ss 43 and 44 of the Courts of Judicature Act 1964. The issue was thus whether one Court of Appeal could set aside the previous orders of another Court of Appeal in the context of ss 43 and 44 of the Courts of Judicature Act 1964.

Held, allowing the appeal with costs and ordering that the deposit be refunded to the appellant:

It seemed clear that the Court of Appeal had, on 6 September 1996, taken the position that as the application was not made, in the first instance, to the High Court in contravention of s 43, the Court of Appeal had no jurisdiction to entertain such an application. Such a construction or proposition ran counter to the express provisions of s 44 which specifically conferred upon the Court of Appeal the jurisdiction to grant interim orders and make incidental directions in prescribed circumstances. The Court of Appeal had, on 6 September 1996, erred in setting aside the injunctive orders made previously by the Court of Appeal on 3 January 1995 and 2 August 1995 respectively (see pp 148F–G, 149C).

[Bahasa Malaysia summary

Pada 14 Oktober 1998, Mahkamah Persekutuan telah membenarkan perayu merayu terhadap keputusan Mahkamah Rayuan yang diberi pada 6 September 1996. Memorandum rayuan telah membangkitkan isu-isu yang berikut: (1) Mahkamah Rayuan telah salah arahkan dirinya di sisi undang-undang dengan membenarkan permohonan responden untuk mengenepikan perintah-perintah Mahkamah Rayuan terdahulu yang diberi pada 3 Januari 1995 dan 2 Ogos 1995 masing-masing; dan (2) Mahkamah Rayuan telah salah arahkan

dirinya mengenai tafsiran ss 43 dan 44 Akta Mahkamah Kehakiman 1964. Isu yang dipersoalkan adalah sama ada satu Mahkamah Rayuan boleh mengenepikan perintah-perintah terdahulu Mahkamah Rayuan yang lain di dalam konteks ss 43 dan 44 Akta Mahkamah Kehakiman 1964. A

Diputuskan, membenarkan rayuan dengan kos dan memerintahkan deposit dibayar balik kepada perayu: B

Ia adalah jelas bahawa Mahkamah Rayuan telah, pada 6 September 1996, mengambil pandangan bahawa memandangkan permohonan tidak dibuat terdahulunya kepada Mahkamah Tinggi bercanggah dengan s 43, Mahkamah Rayuan tidak mempunyai bidang kuasa untuk mendengar permohonan tersebut. Tafsiran atau usul seperti itu melanggar peruntukan nyata s 44 yang khususnya memberi bidang kuasa kepada Mahkamah Rayuan untuk memberi perintah interim dan untuk membuat arahan sampingan di dalam keadaan-keadaan yang diperuntukkan. Mahkamah Rayuan telah, pada 6 September 1996, terkhilaf dengan mengenepikan perintah injunktif yang dibuat terdahulunya oleh Mahkamah Rayuan pada 3 Januari 1995 dan 2 Ogos 1995 masing-masing (lihat ms 148F–G, 149C).] C D

Notes E

For cases on Court of Appeal, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 3597–3601.

Legislation referred to

Courts of Judicature Act 1964 ss 43, 44 F

Appeal from: Civil Appeal No W–03–16 of 1994 (Court of Appeal, Kuala Lumpur)

Raja Aziz Addruse (*Chew Eng Keat* with him) (*Lim Huck Aik & Co*) for the appellant.

Shahul Hameed Amirudin (*Gregory Dicom* with him) (*Khana & Co*) for the respondent. G

Steve Shim CJ (Sabah and Sarawak) (delivering judgment of the court):

The issues

On 14 October 1998, the Federal Court granted the appellant leave to appeal against the decision of the Court of Appeal given on 6 September 1996. However, no specific question has been framed for our consideration. Be that as it may, the memorandum of appeal has raised essentially the following issues: H

(1) that the Court of Appeal has misdirected itself in law in allowing the respondent's application to set aside the previous orders of the Court of Appeal granted on 3 January 1995 and 2 August 1995 respectively; I

(2) that the Court of Appeal has misdirected itself on the construction of ss 43 and 44 of the Courts of Judicature Act 1964.

In our view, the issues raised can be effectively condensed into one postulatum, namely, whether the orders made by one Court of Appeal can be set aside by another Court of Appeal in the context of ss 43 and 44 of the Courts of Judicature Act 1964. This important question of law should be sufficient to dispose the appeal.

The background

The factual background is somewhat complicated but it needs to be stated in order to understand the perspectives. On 14 May 1987, the respondent filed a suit for wrongful termination of service, praying the following:

(a) a declaration that his termination was unlawful;

(b) a declaration that the respondent had obtained a pass in Bahasa Melayu at SPM level and had therefore satisfied the appellant's condition to be confirmed as a traffic supervisor;

(c) an order that damages be assessed with interest; and

(d) costs.

On 18 July 1994, the High Court, pursuant to an application by the respondent, granted him summary judgment on prayers (a), (c) and (d) above. Prayer (b) was later granted on 20 October 1994. There was no appeal by the appellant on prayers (a), (c) and (d) but only on prayer (b). On 24 October 1994, the deputy registrar assessed damages pursuant to prayer (c) ordering the appellant to pay to the respondent the sum of RM2,274,151.42. The appellant appealed against this assessment. The appellant attempted but failed to obtain a stay of execution both from the deputy registrar and the High Court judge. On 7 December 1994, the deputy registrar made a garnishee order absolute against Bank Bumiputra Malaysia pursuant to garnishee proceedings. The appellant's appeal against the said garnishee order absolute and an application for stay was dismissed by the High Court judge. The appellant then appealed to the Court of Appeal against the High Court's refusal to stay the garnishee order. On 19 December 1994, Bank Bumiputra Malaysia (garnishee) effected payment of the garnisheed sum to the respondent. On 3 January 1995, the Court of Appeal on being informed that the garnishee had made payment and upon an oral application by the appellant, granted a restraining order against the respondent, restraining him from disposing the sum deposited in a bank account. Thereafter, on 2 August 1994, the Court of Appeal, again on the application by the appellant, granted another order that the respondent deposit the judgment sum with the court. The respondent then filed an application for leave to appeal to the Federal Court but it was refused on the ground that the orders made by the Court of Appeal were interlocutory in nature and therefore unappealable. The respondent then applied to the Court of Appeal to set aside the two orders alleging that they were made without jurisdiction. On 6 September 1996, the Court of Appeal

allowed the respondent's application. Dissatisfied, the appellant filed an application for leave to appeal to the Federal Court. On 18 October 1998, leave was granted. On 13 February 2000, when the present appeal came up for hearing, it was adjourned but the Federal Court made an order restraining the respondent from dissipating the judgment sum. On 29 March 2000, the Federal Court, on the application by the appellant, made another order that the judgment sum be deposited in court. The respondent initially applied to set aside these orders but subsequently withdrew them. Instead, he applied for stay but it was dismissed. The respondent had thereafter filed a fresh application to set aside the same orders. As yet, no date has been fixed for the hearing.

Scope and effect of ss 43 and 44 of the Courts of Judicature Act 1964

Much of the facts alluded to are quite irrelevant to the consideration of the question postulated. Here we are concerned essentially with the orders made by the Court of Appeal, ie the restraining order dated 3 January 1995 restraining the respondent from dissipating the judgment sum and the order dated 2 August 1995 directing the respondent to surrender the certificate of fixed deposit account where he had lodged the judgment sum. As mentioned a moment ago, these orders were subsequently set aside on 6 September 1996 by another panel of the Court of Appeal principally on the ground that the previous Court of Appeal had no jurisdiction to grant such orders having regard to the provisions of s 43 of the Courts of Judicature Act 1964 which states:

> Wherever application may be made either to the High Court or to the Court of Appeal, it shall be made in the first instance to the High Court.

In our view, s 43 has to be construed in the context of the application for injunctive orders made by the appellant in this case. Given this scenario, it seems clear that the Court of Appeal had, on 6 September 1996, taken the position that as the application aforesaid was not made, in the first instance, to the High Court in contravention of s 43, the Court of Appeal had no jurisdiction to entertain such an application. With respect, such a construction or proposition runs counter to the express provisions of s 44 which specifically confers upon the Court of Appeal the jurisdiction to grant interim orders and make incidental directions in prescribed circumstances. Section 44 states:

> (1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.
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> (2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.
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> (3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the Court.

A In deciding the application, the Court of Appeal may take into consideration the failure on the part of the appellant in not complying with s 43. It may inquire into the reasons for such failure. If the failure has caused prejudice to the other side resulting in injustice, it is perfectly entitled to reject the application. If no injustice is caused, there is no reason for not granting the application. All those are factors relevant to the exercise of B discretion by the Court of Appeal. They do not however adversely affect the jurisdiction of the Court of Appeal in dealing with the said application.

Conclusion

For the reasons stated, it is obvious that the answer to the question posed C must be in the negative. In our view, the Court of Appeal had, on 6 September 1996, erred in setting aside the injunctive orders made previously by the Court of Appeal on 3 January 1995 and 2 August 1995 respectively. On that ground alone, we think it appropriate to allow the appeal with costs here and below. We further order that the deposit be refunded to the appellant. D

Appeal allowed with costs and the deposit ordered to be refunded to the appellant.

Reported by Chew Phye Ken

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